Office - Supreme Court, U.S.
FILED
NOV 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-5195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL JONES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The District Of Columbia Court Of Appeals

REPLY BRIEF FOR PETITIONER

WILLIAM J. MERTENS
(Counsel of Record)
A. FRANKLIN BURGESS, JR.
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

SILAS J. WASSERSTROM
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8000
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. THE DUE PROCESS ISSUE	3
II. THE EQUAL PROTECTION ISSUE	22
CONCLUSION	23

TABLE OF AUTHORITIES

CASES: Page

Addington v. *Texas*, 441 U.S. 418 (1970) ..... *passim*

Baxstrom v. *Herold*, 383 U.S. 107 (1966) 13, 23

Benham v. *Edwards*, 501 F.2d 1050 (N.D. Ga. 1980), *affirmed*, 678 F.2d 511 (5th Cir. 1982) 12

Bethea v. *United States*, 365 A.2d 64 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977) 11

Humphrey v. *Cady*, 405 U.S. 504 (1972) 23

In re Hodges, 325 A.2d 605 (D.C. 1974) 20

In re Moye, 584 P.2d 1097 (Cal. 1978) 19

In re Nelson, 408 A.2d 1233 (D.C. 1979) 20

In re Winship, 397 U.S. 358 (1970) 5

Jackson v. *Indiana*, 406 U.S. 715 (1972) 23

Leary v. *United States*, 395 U.S. 6 (1969) 10

Plyler v. *Doe*, 102 S.Ct. 2382 (1982) 23

Sandstrom v. *Montana*, 442 U.S. 510 (1979) 6, 10

Santosky v. *Kramer*, 102 S.Ct. 1388 (1982) 5, 6, 9, 12

Speiser v. *Randall*, 357 U.S. 513 (1958) 4, 10

United States v. *Brown*, 155 U.S. App. D.C. 402, 478 F.2d 606 (1973) 6, 21

Vitek v. *Jones*, 445 U.S. 480 (1980) 18

Waite v. *Jacobs*, 154 U.S. App. D.C. 281, 475 F.2d 392 (1973) 7

Warren v. *Harvey*, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980) 17

STATUTES:

18 U.S.C. § 3161 *et seq.* 11

21 D.C. Code §§ 542-545 ..... 2, 4

24 D.C. Code § 301(d) ..... *passim*

24 D.C. Code § 301(e) 4

Table of Authorities Continued

Page

MISCELLANEOUS:

Gunther, The Supreme Court 1971 Term—*Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) 23

McCormick on Evidence (2d Ed. 1972) 20

Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605 (1981) 19, 21

Note, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U.L. Rev. 281 (1982) 12

Pasewark, Pantle, and Steadman, *Detention and Rearrest Rates of Persons Found Not Guilty By Reason of Insanity and Convicted Felons*, 139 Am. J. Psychiatry 892 (1982) 14

Pasewark, Pantle, and Steadman, *Comparing Institutionalization Periods and Subsequent Arrests of Insanity Acquitees and Convicted Felons*, [1980] Journal of Psychiatry & Law 305 15

Rosenhan, *On Being Sane In Insane Places*, 179 *Science* 250 (1973) 7

INTRODUCTION

In 1975, when he was 20 years old, the petitioner, Michael Jones, was arrested for trying to steal an inexpensive coat from a department store. Six months later, at his trial on a charge of petit larceny, he raised an insanity defense, claiming that he should not be blamed for what he had done because it had been the product of a mental illness. The government did not contest his claim, and the trial court found that the petitioner had substantiated it by a preponderance of the evidence. On the basis of this finding, and this finding alone, the petitioner was indefinitely committed to a mental hospital pursuant to 24 D.C. Code § 301(d). He has now been confined for nearly seven years on the basis of that commitment, even though, had he been convicted of attempted petit larceny, he could have been sentenced to at most one year in prison.

Petitioner argued in his main brief that this Court need not decide whether his initial commitment under § 301(d) was constitutional, for even if it was, his continued confinement beyond the one year maximum sentence that could have been imposed upon conviction, is not. This is so, petitioner argued, because if the automatic commitment mechanism of § 301(d) can be justified at all, it is on the theory that § 301(d) is necessary to deter false insanity pleas and to shut the "revolving door" which, Congress feared, permits "dangerous criminals . . . 'to have it both ways' "—to escape both conviction and commitment to a hospital. H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 74 (1970). (Quoted at Pet. Br. 10). This rationale for automatic commitment under § 301(d), however, could not, support an *indefinite* commitment, but, as petitioner argued, only one limited to the maximum sentence that could have been imposed had he been convicted. Once that time had passed, these societal interests were fully vindicated and there was no basis for treating him differently from a putative civil committee. Thus, after one year, the need for his continued commitment had to be proved by the constitutionally required standard of clear and convincing evidence. *Addington* v. *Texas*, 441 U.S. 418 (1979). (Pet. Br. 9-13).

The government's lengthy brief is generously peppered with passages intimating that § 301(d) can be sustained as the partially punitive mechanism Congress clearly intended it to be.[1] But the government chooses not to defend § 301(d) directly on this basis. Instead, it contends that this Court must regard § 301(d) merely "as an alternative means for civil commitment" (Gov. Br. 67-68) whose sole purpose is, like civil commitment under 21 D.C. Code §§ 541-545, simply to confine those who are mentally ill and dangerous. Because the automatic commitment of all insanity acquitees under § 301(d) provides, according to the government, a constitutionally adequate surrogate for an individualized determination of mental

---

[1] E.g. "Yet once the acquittee has been permitted to establish his mental illness and its connection with his demonstrated dangerousness by a preponderance of the evidence, without more, society has a *compelling* interest in assigning to the acquittee the burden of proving, with a similar degree of reliability, that these conditions no longer obtain. To impose upon the government the burden of proving by clear and convincing evidence that an insanity acquittee remains dangerously mentally ill would reopen the 'revolving door' shut by Congress through which persons who are more probably than not dangerously mentally ill escape both the criminal sanction and therapeutic commitment. Surely due process does not command any such result." (Gov. Br. 39) (emphasis added).

"Because defendants are permitted to escape criminal responsibility by advocating their own insanity and establishing the same by a mere preponderance of the evidence, it is entirely appropriate to place upon the insanity acquittee the burden of affording reasonable assurance that his release will not cause danger to himself or others because of the very mental disease that produced—and excused—his criminal act." (Gov. Br. 46).

"But in the final analysis this "presumption" rests not solely upon its verisimilitude, but upon the need to maintain the moral integrity of the criminal sanction and of the insanity defense. By purposely availing himself of the insanity defense, petitioner knowingly assumed and thus properly was subjected to the burden established by Section 301(d)." (Gov. Br. 46).

illness and dangerousness by *Addington* standards, the § 301(d) commitment, like a civil commitment, can be of indefinite duration. If § 301(d) cannot be justified as a mode of civil commitment, the government suggests, then it cannot be justified at all, and so even a § 301(d) commitment limited to the maximum sentence that could have been imposed would be invalid. (Gov. Br. 28-29).

By casting its argument in these all-or-nothing terms, the government compels a response that appears to commit petitioner to a position broader than that advanced in his main brief. Petitioner would simply remind the Court that in his view this Court need not decide whether his initial commitment and confinement for one year was constitutional, for he has now been confined for over seven years, and so is entitled to relief.

I. THE DUE PROCESS ISSUE

Before addressing the government's arguments in support of § 301(d), it is essential to clarify two points about how that statute operates. First, § 301(d) requires the automatic, indefinite commitment of all insanity acquitees. At the fifty-day hearing authorized in § 301(d) both the burden of coming forward and of persuasion are placed on the acquitee. The initial indefinite commitment follows automatically from the insanity acquittal. At the fifty-day hearing the government must prove nothing. Thus, under § 301(d), an insanity acquitee is committed indefinitely to a mental hospital without the government's proving the basis for that commitment at all, much less by clear and convincing evidence.

Second, the insanity acquitee's commitment under § 301 is indefinite. It lasts until the acquitee can prove that he is entitled to be released. The acquitee's loss of liberty, then, is in every respect at least as complete as that of an indefinitely committed civil commitee such as the appellant in *Addington*,

whose commitability, this Court held, had to be proven by clear and convincing evidence.[2]

Both petitioner and the amici have argued that § 301 is constitutionally defective because it does not satisfy *Addington*'s requirement that the predicate for commitment be established by clear and convincing evidence. As both petitioner and the amici have pointed out, *Addington* imposes a dual requirement: that the government bear the burden of proof of mental illness and dangerousness, and that it prove those elements by clear and convincing evidence. Both of those requirements are necessary to minimize the risk that an individual will be erroneously committed.

Aside from defending § 301 on its face, the government throws up a two-pronged secondary defense, which petitioner will treat before turning to the government's main argument. First, the government denigrates the importance of the role of both the burden and the standard of proof. As to the burden, the government observes:

> The practical effect of assigning the burden of proof to one party or another is doubtful when the standard of proof is a mere preponderance of the evidence. It is only in the hypothetical case where the evidence is in absolute equipoise that such distinctions matter. (Gov. Br. 45 n. 36).

As to the standard of proof, the government subtley distorts *Addington* by observing that the importance of the standard of proof is "symbolic, if not practical." (Gov. Br. 34).

The government undervalues both the burden and standard of proof. In *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), this

---

[2] In several respects the acquitee's commitment is more oppressive. He is generally assigned to a particularly secure and confining wing of the hospital and both his conditional and unconditional release from the hospital must be approved by the Court. *See* 24 D.C. Code § 301(e). *Compare* 21 D.C. Code § 546 (hospital may release the civilly committed patient without the approval of the court).

Court made clear that "in all kinds of litigation [including civil litigation where the standard of proof is preponderance of the evidence], it is plain that where the burden of proof lies may be decisive of the outcome." This is particularly true in a case such as this, where a highly subjective judgment must be made on the basis of "often unclear, sometimes woefully muddled" testimony. *See* n.3, *infra*. Moreover, the standard of clear and convincing proof is not just of symbolic importance. As this Court has pointed out, the clear and convincing standard not only focuses the factfinder's attention on the quality rather than the quantity of the evidence, *Santosky* v. *Kramer*, 102 S.Ct. 1388, 1400 (1982), but it also instructs the factfinder that he must be more confident in a factual conclusion in favor of the party bearing the burden of proof than would be required in an ordinary civil case. *Addington* v. *Texas*, 441 U.S. 418, 423, citing *In Re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., Concurring). The clear and convincing standard has been recognized as an important instrument shifting the risk of error away from one party and toward the other.

Insanity acquitees, then, are doubly deprived by § 301(d). The statute does not merely relieve the government of establishing the predicate for the acquitee's commitability with the quality of evidence, and to the degree of certitude, required by the clear and convincing standard, it relieves it of the burden of proving commitability at all.

Though it disparages the importance of the clear and convincing standard of proof, and trivializes the significance of shifts in the burden of proof and of persuasion, the government concedes that § 301(d) "on its face" does indeed appear to shift these burdens to "the insanity acquitee facing commitment." (Gov. Br. 45). But as the second prong of its secondary defense, the government argues that even though § 301(d) did not require it to do so, in the petitioner's case it did in fact "shoulder the burden of proof" at the petitioner's fifty-day hearing. (Gov. Br. 43). Hence, the government contends, the shifts in the burden of proof and persuasion under § 301(d) are "not before the Court . . . for they were not actually employed in petitioner's case." (Gov. Br. 45).

But clearly they are before the Court. The trial judge at the fifty-day hearing was operating under a statute that directed him to order release only if the petitioner brought forth evidence sufficient to convince him that the petitioner was not mentally ill and dangerous. 24 D.C. Code § 301(d)(2). There is simply no basis in the record here to assume that the Court at the fifty-day hearing continued the petitioner's commitment on any basis other than petitioner's failure to do so. That he put his "findings" in affirmative terms is immaterial. Indeed, the same "findings" were apparently made at the later release hearing challenged here, even though at that hearing no evidence whatsoever was adduced by either party. (J.A. 10).

The government goes on to suggest that even if petitioner could not be committed except on the basis of clear and convincing evidence, he cannot complain here that the trial court's findings were not "tied explicitly to the standard of clear and convincing evidence" because "the *only* evidence presented was that petitioner remained mentally ill and dangerous to himself or others." (Gov. Br. n.34.) The government's emphasis on the quantity rather than the quality of the evidence is plainly wrong. *See Santosky* v. *Kramer*, 102 S.Ct. at 1400. There is little reason to suppose that the trial court would have found the quality of the psychologist's testimony—particularly on the question of the petitioner's dangerousness—either clear or convincing. (*See* Pet. Br. 2-3). Moreover, harmless error reasoning is simply inapplicable in burden of proof and standard of proof cases. *See*, e.g., *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979).

Nor is it relevant that petitioner's counsel failed "to challenge, by cross examination or presentation of conflicting testimony, the conclusions of the government's expert witnesses at the fifty-day hearing . . . ." (Gov. Br. n.34). At the time of that hearing, petitioner had already been confined for over eight months, and the only case law in the District of Columbia indicated that after the petitioner had been confined for one year, the need for his continued confinement would have to be proved by the government in a civil commitment proceeding. *See United States* v. *Brown*, 155 U.S. App. D.C. 402, 478 F.2d

606 (1973); *Waite* v. *Jacobs*, 154 U.S. App. D.C. 281, 475 F.2d 392 (1973). Thus petitioner's counsel could not anticipate that the fifty-day hearing would take on the significance that the government would have this Court attribute to it.

The bulk of the government's brief, however, is not taken up with this secondary defense, which seeks simply to justify the petitioner's commitment on the basis of facts peculiar to his case. Rather, it is devoted to a defense of § 301(d) on its face. As we have seen, it is clear that under that statute, the insanity acquitee, unlike the civil commitee, is indefinitely committed to a mental hospital without any individualized proof—much less proof by clear and convincing evidence—that he belongs there. Instead, the burden is on him to prove that he does not. Thus he, rather than the state, is made to bear the risk of error in the resolution of an issue where that risk is inherently high[3] and the stakes to the individual are enormous.

This glaring disparity in treatment, the government argues in its brief, is justified by relevant differences between the class of insanity acquitees and the class of putative commitees. The government is limited, however, by self-imposed restraints, for it is wedded to the position that the purpose of the two procedures is precisely the same: to commit those, and only those, who are currently mentally ill and dangerous. It follows, then, that the fact that acquitees have been found to have committed a criminal act can be accorded only evidentiary significance. That is, the past criminal act cannot, on the government's theory, itself supply the basis for even a limited

---

[3] The judgment which must be made is necessarily highly subjective, and must be made on the basis of inherently fallible diagnoses and predictions and often unclear and "woefully muddled" psychiatric testimony. Hence, allocation of the burden of proof, and the standard of proof required, are likely to be outcome determinative. *See Waite* v. *Jacobs*, 154 U.S. App. D.C. 281, 284, 475 F.2d 392, 395 (1973). For a classic study of the difficulty which psychologically normal investigators had talking their way out of mental hospital, see Rosenhan, *On Being Sane in Insane Places*, 179 *Science* 250 (1973).

commitment, but is relevant only to the degree that it indicates dangerousness at the time of the commitment proceedings.

Nevertheless, at one point in its brief the government suggests that it was the very fact that the petitioner had been found to have committed a criminal act, while Frank Addington had not, that justified petitioner's commitment without proof that he was mentally ill and dangerous by *Addington* standards. (Gov. Br. 31 and n.25). But *Addington* cannot be distinguished in this way, for surely it is immaterial whether or not Addington was found in a *separate* judicial proceeding to have committed a criminal act. At the civil commitment hearing itself, Addington did not contest the State's assertion that he had recently been involved in several assaultive episodes, had caused substantial property damage, and had repeatedly, and recently, threatened to injure both his parents and others. Indeed, he also conceded that he was mentally ill. Nevertheless, this Court held, the State was required to prove the contested predicate for his commitment—dangerousness—by clear and convincing evidence. *Addington* v. *Texas*, 441 U.S. at 420-421. All Michael Jones did was try to steal a coat, yet the government would accord him less procedural protection than Frank Addington on the ground that he is not a "civil" commitee.

In light of the fact that petitioner is demonstrably less dangerous than Frank Addington, it is not surprising that the government for the most part shies away from discussing the facts of petitioner's case, and instead attempts to explain why insanity acquitees as a class are different from putative civil commitees. It does so by playing a seemingly endless series of variations on what are essentially three themes.

First, though insanity acquitees seem to be treated less favorably, in fact the risk that the acquitee will be erroneously committed under § 301(d) is, all things considered, not significantly greater than that a putative civil commitee will be erroneously committed at a proceeding at which his commitability is established by *Addington* standards. The government's argument here is that § 301(d) cannot be considered in

isolation, but must be viewed as part of an "integrated scheme" which, taken as a whole, will result in tolerably accurate results. (Gov. Br. 30-31). The idea seems to be that even though the insanity acquitee is committed without clear and convincing evidence that he is mentally ill and dangerous, this deficiency is compensated for by the fact that he has been proven beyond a reasonable doubt to have committed a dangerous act, been found to have been mentally ill at that time, and is later, at the fifty-day hearing, given a lawyer and an opportunity to prove that he should be released. (Gov. Br. 32 and 36).

As petitioner will show, this line of argument depends on the validity of several indefensible presumtions. But aside from its inherent unpersuasiveness, this approach to the issue is precisely that which this Court rejected in *Santosky* v. *Kramer*, *supra*, 102 S.Ct. at 1396 n.9. There is even more reason to reject it here, for it is clear that the risk that the individual will be erroneously committed under § 301(d) is not significantly mitigated either by the trial that precedes commitment or by the fifty-day hearing that follows it.

Second, even if the risk that an individual who deserves to be free will be confined is greater under § 301(d), this is constitutionally acceptable because the stakes for the acquitee are not so high, and for the state are higher, than they are for putative civil commitees. (Gov. Br. 37-40).

Third, the government argues, the higher risk of an erroneous commitment borne by the insanity acquitee is "appropriate" because he knew that he would be made to run this risk when he chose to raise an insanity defense in the first place, and therefore can fairly be required to accept it. (Gov. Br. 46).

These rationales, whether considered separately or cumulatively, cannot justify the indefinite commitment of insanity acquitees on the basis of the acquittal alone.

(1) On the government's view the only justification for committing an insanity acquitee is that he is currently committable, i.e. mentally ill and dangerous. We can be sufficiently

sure that he is currently mentally ill, the government argues, because the factfinder at his criminal trial found by a preponderance of the evidence that he was mentally ill when he committed the criminal act. Though the government vehemently resists admitting that § 301(d)'s validity depends in any way on the adequacy of any presumptions (Gov. Br. at 43-48), it is obvious that proof of a mental illness at the time of the offense can constitutionally substitute for proof of mental illness at the time of commitment only if the presumption of continuing mental illness is a constitutionally permissible one.[4]

---

[4] The government suggests that petitioner's reliance on such presumption cases as *Sandstrom* v. *Montana*, *supra*, and *Leary* v. *United States*, 395 U.S. 6 (1969), is misplaced because those are criminal cases, and this is a civil case. (Gov. Br. n. 35). But obviously presumptions must pass a stringent test of reasonableness in any situation where they might otherwise be used to circumvent a constitutionally required burden of proof. *See Speiser* v. *Randall*, *supra*, 357 U.S. at 526. *Addington* sets such a burden for civil commitment cases. The government cannot, therefore, argue that *Addington* is satisfied because presumptions sufficiently eliminate the risk of error, and at the same time argue that the reasonableness of the presumption can simply be assumed as an unsubstantiated "teaching of common experience" (Gov. Br. 46) because this is not a criminal case. It is also absurd to argue that the fifty-day hearing does not involve reliance on presumptions, when the mandatory presumption that an insanity acquittal establishes mental illness and dangerousness is inherent in the very fact that at the hearing the acquitee bears the burden of going forward and of persuasion. In a particularly obscure argument, the government contends that a § 301(d) commitment is not based on any presumptions because the "*findings* arrived at in the prior criminal trial [are] the very facts said to be 'presumed' at the fifty-day hearing." (Gov. Br. 47). But the factfinder at the criminal trial is not asked to make a judgment one way or the other about whether the defendant's mental illness continued beyond the time of his criminal act; whether he was mentally ill at the time of trial; whether he was dangerous when he committed the criminal act; or whether he was dangerous at the time of trial.

The presumption of continuing insanity is unsupportable. To begin with, the wide variation in the duration of possible mental illnesses, and the quick and effective treatability of many, count strongly against inferring continuing mental illness in all cases,[5] particularly when there is likely to have been a long period of hospitalization and treatment between the acquitee's arrest and trial.[6] Moreover, the insanity acquittal merely shows that mental illness was found, by a preponderance of the evidence, to have existed with respect to one particular act at one particular time in the past. Indeed, as the District of Columbia Court of Appeals has said, an insanity acquittal under the prevailing formulation of the insanity defense is ultimately more a "social or moral judgment about whether a man should or should not be held accountable" for his criminal act, than a medical conclusion. *Bethea* v. *United States*, 365 A.2d 64, 76 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977). But the existence of a mental illness for civil commitment purposes is, quintessentially, a medical judgment, and not, one hopes, a "social and moral one." *Addington* requires that the existence of such an illness at the time of commitment be proved by clear and convincing evidence.

But even if the probability requirements for a presumption of continuing mental illness were met, the presumption would still be unfair to individual acquitees. Individualized justice—where the individual's liberty is at stake—requires direct proof of facts instead of actuarial reasoning except in unusual circumstances. No such circumstances are present here. Mental ill-

---

[5] See Amicus Brief for the American Civil Liberties Union at 12-13, and sources cited therein.

[6] In petitioner's case, he was hospitalized for six months between his arrest and trial. In most cases, the delay is likely to be far longer. And, because the Speedy Trial Act, 18 U.S.C. 3161 *et. seq.*, does not apply in Superior Court, the government is wrong in suggesting that it affords protection against long delayed insanity acquittals. (Gov. Br. n. 43.).

ness is determined diagnostically, not predictively, and is susceptible to direct proof. Moreover, following the fifty-day observation period,[7] the state surely is in a better position to prove current mental illness if it exists than the acquitee is to disprove it if it does not.[8]

(2) The government's argument that proof of a past criminal act serves as a sufficiently accurate surrogate for proof of current dangerousness obviously also depends on the validity of a presumption. Like the presumption of continuing mental illness, this presumption of dangerousness is unsupportable. To begin with, while it may be true that an "affirmative finding of the past commission of a dangerous act anchors the commitment decision in a way that is not *inherent* in civil commitment proceedings . . ." (Gov. Br. 36) (emphasis added), this difference cannot justify § 301(d)'s mandatory presumption of current dangerousness from a single past criminal act. Virtually all involuntary civil commitments are initiated because the putative civil commitee has engaged in some form of criminal conduct.[9] In *Addington* itself, the putative commitee conceded a series of violent acts in the recent past, and it was apparently a criminal assault which spawned the commitment proceedings. Nevertheless this Court required that Addington's cur-

---

[7] Petitioner has never challenged the propriety of committing insanity acquitees for a complete mental examination to enable the government to decide whether to initiate civil commitment proceedings.

[8] *Compare Santosky* v. *Kramer*, *supra*, where this Court required the state to adduce clear and convincing evidence in another context in part because the state's "ability to assemble evidence inevitably dwarfs the ability of [the individual] to mount a defense." 102 S.Ct. at 1399. See also Note, *Rules for An Exceptional Class: the Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U.L. Rev. 281 (1982).

[9] *See Benham* v. *Edwards*, 501 F. Supp. 1050, 1069 (N.D. Ga. 1980), *affirmed*, 678 F.2d 511 (5th Cir. 1982). Where no "overt" criminal act is involved, a criminal threat of some sort is.

rent dangerousness be proved by clear and convincing evidence, though he conceded past acts of violence. Thus while proof of a past criminal act may not be *inherent* in civil commitment proceedings, such proof is virtually always present. Were this Court to accept the government's arguent here, the clear, straightforward and compelling teaching of *Addington* would have to be abandoned upon the slightest procedural variations.[10]

But more important, proof of a past criminal act merely "anchors" a commitment decision to another floating ship unless it can be shown that proof of a single criminal act is itself securely moored to current dangerousness. And it is not. When Congress enacted the present statutory scheme, it did not cite any empirical evidence indicating that mentally ill persons who have committed a criminal act are likely to commit additional dangerous acts in the future. In fact, the relevant available evidence suggests that only a small percentage of persons who have been found mentally ill and have engaged in past criminal behavior commit additional criminal or violent acts.[11]

---

[10] In *Baxstrom* v. *Herold*, 383 U.S. 107 (1966), for example, this Court struck down an abbreviated New York procedure for committing incarcerated convicts indefinitely as mentally ill. That procedure also applied only to individuals whose past criminal conduct had been proven in a way not inherent in civil commitment proceedings. This Court ruled that this difference did not justify a watered down commitment proceeding for convicts. Nor would it justify watering down the due process requirements of *Addington*. Yet on the government's cramped reading of *Addington*, that decision would not control, and an entirely new balancing process would have to be undertaken.

[11] *See* Amici Briefs of The American Civil Liberties Union, at 13-17 and The New Jersey Department of Public Advocate, at 28-38 and sources cited therein. For the most recent studies, see Pasewark, Pantle, and Steadman, *Detention and Rearrest Rates of Persons Found Not Guilty By Reason of Insanity and Convicted Felons*, 139

Thus, even if the government is correct in its claim that current research suggests that violent criminal conduct is "the most powerful available indicator of a high probability of future dangerous conduct" (Gov. Br. 49-50), that research would not support § 301(d)'s mandatory presumption of dangerousness, for it is a very weak indicator at least.

More importantly, the state is, of course, free to use evidence of past conduct to prove current dangerousness. At a commitment proceeding following an insanity acquittal, the acquitee's criminal acts would be admissible on the issue of dangerousness, and in many instances the factfinder would doubtless conclude that this evidence established dangerousness clearly and convincingly. But the significance of past criminal conduct to the prediction of dangerousness surely varies from case to case, and the government has advanced no reason—much less a "compelling one" (Gov. Br. 39)—why the acquitee is not entitled to an individualized determination of dangerousness before he can be committed indefinitely.

Finally, the petitioner here engaged in no violent conduct whatever, yet he was committed indefinitely under § 301(d)'s implicit mandatory presumption of dangerousness. On the government's own reading of the empirical research, it is only violent conduct that can serve as a valid indicator of dangerousness. There is simply no support whatsoever in that research for the proposition that a single, non-violent, criminal act is a reliable basis for a prediction of future dangerousness. Thus, even if the government's very doubtful argument is correct that any conduct defined as criminal by the legislature constitutes the sort of danger to the community upon which an indefinite commitment to a mental hospital can be predicated

---

Am. J. Psychiatry 892, 895 (1982); Pasewark, Pantle, and Steadman, *Comparing Institutionalization Periods and Subsequent Arrests of Insanity Acquitees and Convicted Felons*, [1980] Journal Psychiatry & Law 305, 313.

(Gov. Br. 53-54),[12] petitioner's non-violent act would not justify his commitment as dangerous. Clearly that act did not establish such dangerousness by the clear and convincing evidence that *Addington* requires.

(3) The government contends that this Court should reject the petitioner's argument that the basis for the indefinite commitment of an insanity acquitee must be established by clear and convincing evidence because, while such a ruling would benefit those who are actually acquitted, it would harm the class of prospective insanity acquitees. (Gov. Br. 37-39). This is so, the government suggests , because Congress would likely respond to a ruling in petitioner's favor by raising the criminal defendant's burden of proving insanity to proof by clear and convincing evidence so that an indefinite commitment could then follow automatically from it, thereby closing once again the revolving door that this Court would have reopened by its decision.[13] This argument should be rejected for several reasons. To begin with, all petitioner is asking the

---

[12] On this view, a defendant who is acquitted by reason of insanity of, for example, vagrancy or trespass, could, under § 301(d), be automatically committed indefinitely. Not only that, but so long as his mental illness was likely to cause him to continue in his wandering ways, he would, it seems, be dangerous to others, and therefore never entitled to release. Similarly, even without a criminal conviction, a person whose mental illness made it likely that he would wander onto another's property could be civilly committed and confined until he could prove that this "danger" to others no longer persisted.

[13] Much of what is said about revolving doors betrays a fundamental misunderstanding of the law in this area. Even if this Court were to uphold § 301(d) as applied to petitioner, some people acquitted by reason of insanity, even of violent crimes, would be neither punished nor committed. For if the acquitee can affirmatively prove at the fifty-day hearing that he is no longer mentally ill or dangerous, he is entitled to immediate release. Conversely, even if this Court rules that automatic indefinite commitment under 301(d) is invalid,

Court to do is to rule that, having been confined for longer than he could have been upon conviction, he is now entitled to relief. Such a ruling would open no revolving door. Moreover, whether or not Congress chooses for other reasons to raise the burden on criminal defendants to prove insanity, doing so would have little or no effect on the validity of an automatic indefinite commitment following an insanity acquittal. The constitutional argument against such a commitment turns primarily on the fact that what is demonstrated by an insanity acquittal is insufficiently *probative* to justify automatic, indefinite commitment, not that it is insufficiently *proved* at the criminal trial. Finally, this argument simply misses the point of the petitioner's due process claim: that he has never been proved to be committable by the constitutionally required standard of proof, and thus is entitled to release if that standard cannot now be met.[14]

---

petitioner, and other acquitees, will not necessarily be released. All the government must do to continue the acquitee's confinement is to prove the need for that confinement by the constitutionality required standard of proof.

[14] The government's argument here is one that could be made for the denial of virtually all due process claims: if the Court holds that procedural protections are constitutionally required before an individual can be denied a statutory entitlement, the legislature may eliminate the entitlement altogether. *Ergo*, the due process claim should be rejected. A somewhat similar argument can be raised against all equal protection claims; if the Court rules that legislation burdens one group unfairly, the legislature may rewrite it to burden all alike.

The fact is, the petitioner's mental illness was never proved by clear and convincing evidence as *Addington* requires. Whether or not Congress could or would establish a procedure whereby an insanity acquittal did demonstrate mental illness by such a standard is simply beside the point. Petitioner's rights should not be denied him on the basis of conjecture and speculation about how Congress might react to a decision in his favor.

(4) The government argues that even if there is a greater risk of an erroneous commitment under § 301(d) than in a civil commitment proceeding, this is an acceptable risk because acquitees have less at stake than putative civil commitees. This is alleged to be so because "there is little incremental stigma attaching upon civil commitment to an insanity acquitee who by then has already been found to have been recently mentally ill and dangerous." (Gov. Br. 40).[15]

Even assuming insanity acquitees and putative civil commitees can be distinguished generally in terms of the incremental stigma of commitment, which is doubtful,[16] the unquestionably more significant liberty interests at stake far overshadow concerns about potential stigmatization. And the possible loss of liberty from wrongful commitment is the same for both groups.[17] Except on some partially punitive rationale,

---

[15] At this point in its brief the government cites *Addington*, where, it would seem, the "incremental stigma" of an eighth commitment in six years was likely to be less than devastating to Frank Addington's reputation in his community. While *Addington* involved a balancing process, it was, petitioner submits, a process which led the Court to reach the conclusion that before an individual can be committed indefinitely to a mental hospital, the need for that commitment must be proved by clear and convincing evidence. This is so even though in particular cases, such as *Addington* itself, many of the factors that led the Court to that conclusion are likely to be missing.

[16] An insanity acquittal is simply a finding that the defendant was not morally responsible for a particular act because he was mentally ill at the time of the act. This is very different from the "statement" implicit in confining a person to a mental hospital as dangerous to society. Moreover, it is the hospitalization itself that may constitute the most devastating stigma.

[17] In *Warren* v. *Harvey*, 632 F.2d 925 (2d Cir.) *cert. denied*, 449 U.S. 902 (1980), the Court upheld automatic commitment for insanity acquitees. While it mentioned differences in stigmatization, it recognized that loss of liberty was a far more significant interest. It upheld automatic commitment on a quasi-punitive rationale.

which the government pointedly declines to advance,[18] the insanity acquitee's liberty interest is precisely the same as that of a putative civil committee—if he is not currently mentally ill and dangerous he is entitled to immediate release[19]—and his erroneous commitment to a mental hospital is every bit as offensive. Indeed, *Vitek* v. *Jones*, 445 U.S. 480 (1980), teaches that even a properly convicted criminal has a significant interest in not being committed to a mental hospital. An acquitee, who will otherwise be free, obviously has a far greater interest.

(5) The government argues that unlike the Texas procedure struck down in *Addington*, § 301(d) "reflects a broad social consensus that the unique circumstances of an insanity acquitee justify confidence in the reliability of a commitment decision reached without requiring clear and convincing evidence of illness and future dangerousness," and "that accordingly 301(d) is consistent with the requirements of due process." (Gov. Br. 42).

To begin with, this "broad social consensus" simply does not exist. While twelve years ago only three states required that commitment procedures for insanity acquitees meet civil

---

[18] The government hints, but does not quite argue, that the governmental interest in committing mentally ill and dangerous insanity acquitees is greater than its interest in committing others who are dangerously mentally ill. (Gov. Br. 36). If there is such a greater interest which would justify allocating the risk of error to the acquitee, it can only be based on a rationale that attributes more than evidentiary significance to the criminal act. If such a greater interest does exist, it is, as petitioner argued, fully vindicated once the acquitee has been confined as long as he could have been upon conviction, and the risk of error must then be borne by the government. (Pet. Br. 11-13, 30).

[19] Petitioner recognizes that an automatic short term commitment following an insanity acquittal would be justifiable while the government determined whether it wished to initiate civil commitment proceedings.

commitment standards, now at least nineteen do, and several additional states require civil commitment where, as in petitioner's case, the criminal charge is a misdemeanor. Only about a dozen states, it seems, require automatic indefinite commitment for all insanity acquitees, as § 301(d) does. *See* Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605, 605-606, nn.3-6 (1981). And the trend in state courts has clearly been toward affording greater protections to insanity acquitees. *See* cases cited in Pet. Br. n. 19, and *see In re Moye*, 584 P.2d 1097 (Cal. 1978). This hardly represents a broad social consensus.

Moreover, those states which do authorize automatic commitment do not necessarily share the government's confidence in the reliability of automatic commitment. Rather, it is more likely that they regard the automatic commitment of insanity acquitees as justifiable on the quasi-punitive principles which the author of the source cited by the government terms "the cleanup doctrine." *See* Note, *supra*, 94 Harv. L. Rev. at 617-622. Yet the government does not argue for the validity of the petitioner's commitment on this basis.

(6) The government does not make an independent argument that indefinite automatic commitment under § 301(d) is constitutional because the defendant, by raising an insanity defense, assumes the risk that he will be erroneously committed. Nevertheless, a submerged but recurrent theme running through the government's brief is that because the petitioner himself raised an insanity defense his automatic commitment is somehow appropriate, for he "knowingly assumed and thus properly was subjected to the burden established by Section 301(d)." (Gov. Br. 46). But an insanity acquitee is properly subject to the burden *only* if that burden is otherwise reasonable. If it is not, then the burden represents an unconstitution-

al condition on the exercise of a right. Thus the government's argument here simply begs the question.[20]

Moreover, this argument is particularly unfair as applied to the petitioner here. When he raised his insanity defense in 1976, the only case law in the District of Columbia[21] indicated that if he was confined for one year, the maximum sentence he could have received for attempted petit larceny, he would then be entitled to a hearing at which the government would have to prove his commitability beyond a reasonable doubt.[22]

(7) A similar argument, which the government seems to endorse in a footnote and evidently wants this Court to consider, but will not advance as its own, is that the automatic commitment of insanity acquitees is justified by "society's interest in discouraging false insanity pleas."[23] (Gov. Br. 39

---

[20] There is, moreover, no logical inconsistency in raising an insanity defense—a claim by the defendant that he should be absolved of responsibility for a prior criminal act—and later contesting current mental illness and dangerousness. Though under traditional evidence law the acquitee's prior pleadings would be admissible against him at the later proceeding, they would not be afforded extraordinary evidentiary weight. McCormick on Evidence 635 (2d Ed. 1972).

Contrary to the government's suggestion (Gov. Br. 46), there is no affront to the integrity of the courts, the criminal sanction, or the insanity defense when this occurs. And the government can have no moral claim or justifiable interest in a procedure that increases the risk of erroneously committing those who have met the burden of proving that they were entitled to an acquittal.

[21] *See supra* at 6-7.

[22] In the District of Columbia at that time, the government at a civil commitment proceeding was required to prove mental illness and dangerousness beyond a reasonable doubt. *In re Hodges*, 325 A.2d 605 (D.C. 1974). Now it must prove commitability by clear and convincing evidence. *In re Nelson*, 408 A.2d 1233 (D.C. 1979).

[23] Except in the rare case of a wholly fabricated insanity defense, it is far from clear precisely what a false insanity plea really is, for both mental illness and culpability generally exist in varying degrees. In

n.30). As petitioner has suggested, automatic commitment under § 301(d) could arguably be justified as a mechanism to deter false insanity pleas and to assure that those who undeservedly obtain an insanity acquittal are confined.[24] But this rationale for automatic commitment under § 301(d) cannot justify confining the insanity acquitee for longer than he could have been confined had he not raised an insanity defense at all, and been convicted.[25]

---

any case, as a device for deterring false insanity pleas, harsh post-acquittal provisions are subject to challenge as overinclusive in that they will necessarily deter valid insanity pleas as well. Limiting confinement under a § 301(d) commitment to the maximum sentence that could have been imposed upon conviction would substantially mitigate this problem of deterring valid insanity please. Indeed, relatively harmless but mentally disturbed defendants charged with misdemeanors are precisely those who should feel free to raise an insanity defense without fearing an undue risk of an unnecessarily long confinement in a mental hospital. Surely if this Court decides this case against petitioner, a defendant charged with a misdemeanor who is mentally ill and needs treatment will be exceedingly reluctant to plead insanity.

[24] In *United States* v. *Brown*, *supra*, the court recognized that modern formulations of the insanity defense "call for the acquittal of persons who may have meaningful elements of responsibility." 155 U.S. App. D.C. at 407, 478 F.2d at 611. For this reason, the court upheld automatic commitments limited in time to the sentence that could have been imposed upon conviction. *See also* Note, *supra*, 94 Harv. L. Rev. at 624, where the author suggests that the urge to punish insanity acquitees stems from the belief that their acts necessarily involve some element of choice, and that harsh post-acquittal commitment procedures express the belief that all insanity defenses are in some sense false.

[25] Ironically, the supposition underlying the notion that § 301(d) would in fact succeed in deterring some false insanity pleas is in direct conflict with the main thrust of the government's brief. Under § 301(d)(2), the acquitee who can demonstrate that he is not mentally ill or dangerous is entitled to immediate release. Thus, if the government is indeed right that § 301(d) procedures involve little risk of

(8) The government also argues that considerations of judicial economy and integrity make it permissible to allocate the burden of proof to the acquitee to rebut the effect of the findings at the criminal trial. (Gov. Br. 47). This argument is misplaced. In cases where there is a factual basis for a presumption, then a shift in the burden of proof may effect savings in judicial energy without unnecessary risk to important individual rights. Here, there will be no saving in judicial time: each side will almost certainly still present the same evidence as it otherwise would.[26]

II. The Equal Protection Issue

The petitioner's claim that he was denied equal protection is essentially congruent with his claim that he was denied due process. That is, if he has been denied due process, he has also been denied equal protection; while if he has not been denied due process, it can only be on the basis of reasoning that would defeat his equal protection claim as well. If petitioner's due

---

error that sane acquitees will be confined, the sane but clever criminal defendant who contemplates manufacturing an insanity defense has little to fear. All he need to do to gain his release is show that he had feigned his insanity. Thus § 301(d) can work as a deterrent to manufactured pleas only on the supposition that sane aquitees will in fact be confined persuant to it because of their inability to prove their sanity. This, of course, is precisely what the government argues elsewhere in its brief will not occur.

[26] The cases cited by the government in support of this argument (Gov. Br. 47) are inapposite. They deal with the question of whether a party is entitled to relitigate an issue actually determined against him in a prior procedure. If relitigation is denied, there will indeed be a savings of judicial resources. That saving is justified only because the party had a full and fair opportunity to litigate the issue at the prior proceeding. Here, as the government properly concedes, there is no suggestion that an insanity acquitee could be denied the right to litigate the issue of whether he is dangerously mentally ill. It has not previously been decided.

process rights were violated, however, there is one, separate issue raised by his equal protection claim: whether he has the right, like putative civil committees in the District of Columbia, to have his commitability determined by a jury. Resolution of that issue might well turn on the level of judicial review which this Court determines to be appropriate. Even if this Court determines that, despite the liberty interest at stake, strict scrutiny is not required, the classification here requires a more convincing justification than do social and economic classifications.

Indeed, though the cases relied on by petitioner, such as *Baxstrom* v. *Herold*, 383 U.S. 107, *Jackson* v. *Indiana*, 406 U.S. 715 (1972), and *Humphrey* v. *Cady*, 405 U.S. 504 (1972), may have used rationale basis language, the results which this Court reached in those cases are more readily explainable in terms of an intermediate level of review. *See* Gunther, The Supreme Court, 1971 Term—*Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); *Cf. Plyler* v. *Doe*, 102 S.Ct. 2382 (1982).

For the reasons advanced in his main brief, petitioner submits that now that he has been confined for as long as he could have been incarcerated upon conviction, there is, on whatever level of review is used, no adequate basis to deny him a hearing with all the procedural safeguards, including the right to a jury trial, afforded to putative civil commitees in the District of Columbia.

CONCLUSION

On the government's own theory, the petitioner's indefinite commitment to St. Elizabeths hospital can be predicated only on the basis of a dangerous mental illness. In *Addington* this Court required that the predicate for such a commitment had to be proved by clear and convincing evidence. The petitioner's dangerousness and mental illness have never been proved at all, but presumed solely from the fact that a judge agreed with his claim that he could not be morally blamed for trying to steal

a coat six months before. His committability has not been proved in the six years since, yet he remains confined. As every day passes he is denied his constitutional rights. Unless the government can now prove the need for his commitment at a civil commitment proceeding, he is entitled to be released.

Respectfully submitted,

WILLIAM J. MERTENS
(Counsel of Record)
A. FRANKLIN BURGESS, JR.
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

SILAS J. WASSERSTROM
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8000
Counsel for Petitioner